tificates delivered by employee of trust company were in most instances those owned by taxpayer before year 1913, rather than those deposited in 1916 and 1917, did not conclusively determine that taxpayer sold stock acquired before 1913."

In *Miller vs. Commissioner of Internal Revenue*, 80 F. (2d) 219 C. C. A. 2), decided December 9, 1935, we have a decision by the Circuit Court of Appeals which bears out every contention made by the petitioner herein, and we will quote from that decision because it answers every argument which the counsel for the Government made in connection with this matter before the Board of Tax Appeals, and which we believe is an answer to the decision of the Board of Tax Appeals in this case.

The Court in its syllabus said:

"2. Written instructions to broker to sell from taxpayer's safe-keeping account stock bought on specified date at designated price held sufficient identification for income tax purposes, of stock sold pursuant to that order, though order was fulfilled by delivery of certificates for stock purchased at earlier date.

"3. Certificate of stock delivered by broker should be treated as proper means for identification of stock sold for income tax purposes, where taxpayer makes no designation of particular stock at time of making sale.

"4. Taxpayer's designation, by instructions to broker concerning shares of stock to be sold, is controlling in identification of stock sold, for income tax purposes, though certificate delivered by broker does not correspond with instructions.

"5. 'First-in, first-out' rule for dentification of stock sold for income tax purposes, where taxpayer has purchased different lots of stock at different

times, applies only where there is no identification of stock sold by certificate delivered by broker or by taxpayer's designation."

In the body of the opinion the Court said:

"The decision of the Supreme Court in Helvering v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 79 L. ed. 1343, shows that the 'First-in, First-out Rule' should not have been applied to the sale of this lot of stock where the customer had designated the shares to be sold as those purchased on a particular date and at a particular price. To be sure, the court there was dealing with the sale of corporate shares made through a broker which had been held in a marginal account with other lots of the same kind bought at different times and at different prices. But we cannot see why it should make a difference whether a broker has stock belonging to a customer in a safekeeping account or holds it as security for his advances. In each case the title is in the customer and if the broker has advanced money to purchase the stock he holds it only by way of pledge.'

"In Helvering v. Rankin, 295 U. S. 123, 128, 55 S. Ct. 732, 735, 79 L. Ed. 1343, Brandeis, J., said that: 'The required identification is satisfied, if the margin trader has, through his broker, designated the securities to be sold as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the "First-in, First-out," rule is to be applied.'

"In Richardson v. Shaw, 209 U. S. 365, 378, 28 S. Ct. 512, 516, 52 L. Ed. 835, 14 Ann. Cas. 981, it was said that: 'A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the

same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer.'

"The certificates of stock involved in Richardson v. Shaw, 209 U. S. 365, 28 S. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, had been held by a broker on margin and changed many times, and some of them had been released from pledge and delivered to the customer. The broker became bankrupt and his trustee sought to recover the shares which had been delivered to the customer on the ground that the delivery constituted an unlawful preference. The court held that there was no unlawful preference because a certificate of stock was not the property in the shares but only the evidence thereof and a return by the broker of a certificate different from the one purchased was not a material change in the property rights of the customer.

"The Commissioner relies on decisions of the Court of Appeals of the Third Circuit in Horner v. Commissioner of Internal Revenue, 72 F. (2d) 407, Commissioner of Internal Revenue v. Merchants' & Mfrs.' Fire Ins. Co., 72 F. (2d) 408, and Horner v. Commissioner of Internal Revenue, 78 F. (2d) 813, as showing that the certificate itself governs. But in each of these cases the taxpayer himself had custody of the certificates that he intended to sell, but delivered others to his broker without any special instructions as to the shares to be sold. It was held that intention alone, without designation, could not determine the shares sold. The same result was reached in Skinner v. Eaton, 45 F. (2d) 568 (C. C. A. 2).

"In Howbert v. Penrose, 38 F. (2d) 577, 68 A. L. R. 820, the Circuit Court of Appeals of the Tenth Circuit decided that book entries and a pocket memo-

randum kept by the taxpayer furnished sufficient identification, even though no designation of the shares to be sold was communicated to the broker. It is unnecessary for us to express any opinion as to the rule in such circumstances. We only hold that where there is a designation such as was found sufficient in Helvering v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343, it can make no difference whether the stock is held on margin or not.

"This view carries out the purpose of the taxpayer, and we cannot see that it is contrary to sound public policy. If he had ordered a sale of 500 shares of Otis Elevator Stock without instructions as to dates of purchase, and after the sale had stated that he had intended to sell other shares than those evidenced by the certificates delivered, we should not regard his statement as a sufficient designation. But written instructions to sell embodying the number of shares and dates of purchase are an even more persuasive identification of the shares to be sold than the certificates which a broker may deliver without any thought about the particular lot he is selling. The identity of certificates frequently disappears in mergers, consolidations, or split-ups, and a single certificate may be issued in the place of various prior ones. A designation by the taxpayer of just the shares he is selling is often the best, if not the only available means he has for exercising his option to select the particular shares he desires to sell.

"It follows from the foregoing: (1) That where there is no designation by the taxpayer at the time of making the sale, the certificate should be treated as the proper means for identification; (2) that a designation by instructions to the broker of the shares to be sold is controlling though the certificate delivered does not correspond with the instructions; (3) that the 'First-in, First-out,' rule applies only where there is neither identification by a certificate, nor by designation of the taxpayer.

"The order of the Board of Tax Appeals is reversed, and the proceeding remanded, with direction to determine the amount of tax in accordance with the views we have expressed."

It will be noted here that a designation by instructions to the broker of shares to be sold is controlling, though the certificate delivered does not correspond with the instructions. There is no dispute in the Findings of Fact by the Board that the petitioner ordered the sale of specific stock purchased on a specific date. Therefore, in this case, the petitioner has complied with the requirement that he designate the specific stock to be sold, and having so designated it, without any question he is entitled to have the basis of any income tax computed upon the difference in cost between the stock ordered sold and the sale price thereof, without respect to the certificates delivered. The courts so recognize the rule.

In *Fuller vs. Commissioner of Internal Revenue*, 81 F. (2d) 176 (C. C. A. 1), decided January 7, 1936, the petitioner maintained account books showing the date of purchase of each lot of stock in the Packard Motor Car Company, the number of shares bought, the cost, date and amount of each stock dividend, the date of each sale, the number of shares sold, the sale price and the computation of the profit on each sale. Note that the instructions in this case were given by petitioner to his assistant to sell those shares which had cost the most and on which the taxable gain would be the least. The petitioner's assistant examined the ledgers and journals and ascertained therefrom those lots which he claimed were acquired at the highest prices and instructed the bookkeeper to sell the same. A broker was authorized to make the sales in small lots, and the entire 40,000

shares were sold in April of 1930. Broker sale slips were then recorded on the books. The Circuit Court of Appeals held that such instructions were sufficient to identify the stock sold, and in the syllabus said:

> "Where taxpayer, who maintained account book showing date of purchase of each lot of stock, number of shares bought, cost, date and amount of each stock dividend, date of each sale, number of shares sold, sale price, and computation of profits on each sale, instructed assistant to sell stock which had cost the most, 'First-in, First-out' rule held inapplicable in determining taxable gain, as against contention that stock sold could not be identified because taxpayer had received new certificates in stock split-up (Revenue Act, 1928, Paragraphs 22, 111, 112, 113)."

In the body of the opinion the Court said:

> "The Commissioner of Internal Revenue determined that the 25,000 shares thus sold could not be identified and that the provisions of the 'First-in, First-out' rule applied. The Board of Tax Appeals, differing from the Commissioner, adopted the view that the basis for determining the taxable gain derived from the sale of a portion of the stock received in a non-taxable exchange should be determined by apportioning the aggregate costs of all the shares owned by the taxpayer at the time of the exchange to the stock received by him in exchange. It should be said that when the Board of Tax Appeals rendered its decision, Helvering, Commissioner, v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343, indicating that certificates do not constitute the only possible means of identifying stock and holding that shares of stock held on margin and sold may be identified by 'designation' at the time of sale of what lots should be sold and what held, had not been decided. See, also, Miller v. Commissioner, 80 F. (2d) 219, decided December 9, 1935, by the Circuit Court of Appeals

for the Second Circuit. As to the view of the Board of Tax Appeals since the announcement of the Rankin decision, see Wieland v. Commissioner, Docket No. 73098 (decided October 10, 1935).

"When the taxpayer received certificates of stock in the 1929 'split-up,' so-called, his stockholder's interest in the corporation was not changed; it remained precisely what it had been. And the 25,000 shares sold were identified by his directions and by what was done pursuant to them with the specific lots of stock originally purchased in 1925, 1927, and 1928. The cost of such lots constituted the basis for determining the profit on the sale. This taxable gain was included in the taxpayer's return and the tax paid. In our opinion the Commissioner's determination of a deficiency based on the 'First-in, First-out' rule was, under the circumstances, unwarranted. So, too, as to the redetermination of a deficiency by the Board of Tax Appeals.

"The decision of the Board of Tax Appeals is reversed, and the case remanded to that Board, with instructions to reconsider the question before it in accordance with this opinion."

Note that in the foregoing case the designation by the petitioner was to petitioner's assistant, who, in turn, instructed the Petitioner's bookkeeper to sell the stocks which cost the most. In the instant case, the undisputed facts show that the petitioner instructed the broker to sell specific shares which had been purchased at a specific time. There can, therefore, be no question about the sufficiency of designation, and, as stated in the foregoing cases, the fact that other certificates were delivered does not change the order of sale or the shares sold.

In *Millikan vs. Commissioner of Internal Revenue*, 83 F. (2d) 213 (C. C. A. 2), decided April 6, 1936, the

facts sufficiently appear in the syllabus and in the opinion of the Court. It will be noted that the margin trader had on deposit with the broker certain shares which were held as collateral by the broker. Subsequent to that time, additional shares were purchased. It was the understanding that the collateral shares were not for sale, except on direction or to protect the account. An order was given to sell 600 shares, without further designation. The Court held that in view of the fact that the collateral shares were not to be sold, the 600 shares ordered sold were sold from the margin account. In the syllabus the Court said:

"1. That broker in confirmation of sale of stock ordered by margin trader had delivered certificates representing certain shares of stock deposited by such trader as collateral held not conclusive as to identity of shares sold for purpose of determining profit on sale for tax purposes, where there was undisputed evidence showing that other shares were actually sold.

"2. Where margin trader had at various times purchased shares of a particular stock and had deposited with broker other shares of same stock as collateral with understanding that collateral shares were not for sale except on direction or to protect account, shares sold when trader merely ordered sale of 600 shares held sufficiently identified for income tax purposes as shares sold on margin, in absence of direction to sell collateral or necessity for sale to protect account."

In the body of the opinion the Court said:

"The Commissioner based the deficiency on the theory that the broker delivered certificates representing certain shares of stock deposited as collateral and that this identified the shares sold. But this is not conclusive, for there is undisputed evidence show-

ing that other shares were sold. It was held in Helvering v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 735, 79 L. Ed. 1343, that, when no certificate is issued to the customer or earmarked or otherwise allocated to him and all certificates for stock are in the name of the broker and are commingled and held by the broker for a common benefit of all dealing in that particular stock, there is no conclusive identification of the shares. The court pointed out that it was a fallacy to assume that the shares of stock can be identified only through stock certificates, saying: 'It is true that certificates provide the ordinary means of identification, but it is not true that they are the only means possible. * * * Particularly is this so when, as here, the thing to be established is the allocation of lots sold to lots purchased at different dates and different prices.'

"It was found by the Board, and it was undisputed, that the collateral stock was accepted by the brokers 'with the definite understanding that said securities are deposited as collateral and not for sale under any circumstances, except as a customer might direct or might be necessary for the protection of the account.' It is conceded that there was no instruction to the brokers to sell any of the collateral stock. Neither was there any sales necessary to protect the account because on that day the margin was ample. It is thus plain that the brokers had no option as to which class of stock was to be sold on petitioner's order. Within Helvering v. Rankin, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343, and Miller v. Commissioner, 80 F. (2d) 219 (C. C. A. 2), the petitioner has sufficiently established that the sales here were from the stocks held on margin. * * *".

It will be noted in the foregoing that the Court recognized the designation of stock to be sold because of an agreement or understanding that collateral stocks were not to be sold and that, therefore, the stock sold was the

stock in the margin account. In the case at bar, there was a specific designation of shares of stock to be sold, identified by date of purchase. What better designation could there be by the petitioner than such a specific lot?

In *Kraus vs. Commissioner of Internal Revenue*, 88 F. (2d) 616 (C. C. A. 2), decided March 8, 1937, the Court in its syllabus said:

> "3. In taxation of gain on sale of stock, 'first-in, first-out rule' is applicable only, when there is no identification of shares sold with shares purchased, and although stock certificates are not the only means of identification and direction to broker to sell shares designated by date of purchase and price paid will be sufficient to establish identity of stock sold for determining cost basis, notwithstanding that broker actually delivers other certificates than those he was directed to sell, mere intention without more is not designation (Revenue Act 1928, par. 113 (a) (6), 26 U. S. C. A., par. 113 note)."

In the body of the opinion the Court said:

> "It may be taken as established that if the petitioner were able to identfiy the stock he sold with any particular stock he acquired that he would be entiled to take the basis of that stock so identified as the basis of the shares sold. Section 113 (a) (6) Revenue Act of 1928, 26 U. S. C. A. par. 113 note. * * * He had the right to sell whatever stock he desired and the right of course to have the taxable gain, if any, computed on the basis of the cost of the particular shares which he elected to sell. * * * A direction to a broker to sell shares designated by date of purchase and price paid will be sufficient to establish identity of the stock sold for determining the cost basis of it even though the broker actually delivers other certificates than those he was directed to sell,

but intention without more is not designation. Miller v. Commissioner, 80 F. (2d) 219 (C. C. A. 2). See, also, Fuller v. Commissioner (C. C. A. 81 F. (2d) 176."

It will be noted that in the foregoing decision, the Court recognizes that the petitioner has the right to sell whatever stock he desires and that if he so designates the stock he desires to sell, such designation will be controlling, even though other certificates than those he directed to sell, are delivered.

II.

The Circuit Court of Appeals of the Eighth Circuit erred in basing its decision and judgment in the case upon decisions wherein a question of intention only was involved, and where there was no designation.

The decision of the Circuit Court of Appeals is to be found on page 35 of the Transcript of Record. It will be noted that in the opinion the Court said:

"All the courts agree that the mere intention of the trader to sell particular shares without further identification is insufficient. Snyder v. Commissioner, 295 U. S. 134, 137; Vawter v. Commissioner (C. C. A. 10), 83 F. (2d) 407; Skinner, et al. v. Eaton (C. C. A. 2), 45 F. (2d) 568. In Curtis v. Commissioner, 89 F. (2d) 736, this court had under consideration a case in which there was no mistake in the transaction as consummated. Everything was done under and in accordance with the desires of the petitioner who had the choice of so handling the matter that the transfer of stock could have been made from that acquired from a specific source. This court in that case recognized the certificate as the customary means of identification of stock in the following language:

"'It may readily be conceded that certificates for stock are not the exclusive method of identifying stock dealt with, but "it is true that certificates provide the ordinary means of identification." ' Citing Helvering v. Rankin, supra. It ventured no opinion as to the controlling effort of instructions if violated by a selling agent, and held that in the situation presented it must consider and follow what the taxpayer did and not what he might have done. Citing United States v. Safety Car Heating Co., 297 U. S. 88, 98, and Bonham v. Commissioner (C. C. A. 8), 89 F. (2d) 725."

It will be noted that all of the foregoing decisions deal with cases where there was a secret or undisclosed intention without designation.

The Circuit Court of Appeals, in dealing with the case of *Miller v. Commissioner*, 80 Fed. (2d) 219 (C. C. A. 2) (R., p. 38), says:

"In Miller v. Commissioner, 80 F. (2d) 219, the Circuit Court of Appeals for the Second Circuit, in denying the application of the 'First-in, first-out' rule, held that 'a designation by instructions to the broker of the shares to be sold is controlling, though the certificate delivered does not correspond with the instructions,' and that, where there is a designation such as was found sufficient in Helvering v. Rankin, supra, 'it can make no difference whether the stock is held on margin or not.' In that case the certificates were in the possession of the broker, who also held from the taxpayer written instructions to sell, embodying the number of shares and dates of purchase.

"With the greatest respect for the eminent judges of the Second Circuit, we find ourselves un-

Statutes Involved

The Statutes involved are as follows:

"Revenue Act of 1928, c. 852, 45 Stat. 791:

"Sec. 111. Determination Of Amount Of Gain Or Loss.

(a) Computation of gain or loss.—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

"Sec. 113. Basis for Determining Gain or Loss.

(a) Property Acquired After February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *"

ARGUMENT

I.

The Circuit Court of Appeals erred in failing to hold, as a matter of law, that the required identification of the shares sold was satisfied when the petitioner designated the securities to be sold as those purchased on a particular date, even though a bank employee, contrary to instructions, given by the taxpayer, delivered other certificates.

Law

The United States Supreme Court, and the various Circuit Courts of Appeal, have specifically passed upon

the question as to what constitutes a designation of certain stocks or shares when a sale is being ordered thereof and have specifically stated, as a matter of law, that the petitioner sufficiently identifies the shares to be sold when the petitioner designates such shares as being those purchased on a particular date.

The Supreme Court of the United States in *Helvering vs. Rankin*, 295 U. S. 123-134, 79 L. Ed. 1343, in the body of its opinion said:

> "* * * The fallacy of this argument lies in the assumption that shares of stock can be identified only through stock certificates. It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means. Compare Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 S. Ct. 512, 19 Am. Bankr. Rep. 717, 14 Ann. Cas. 981; Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 S. Ct. 690, 30 Am. Bankr. Rep. 266; Duel v. Hollins, 241 U. S. 523, 60 L. ed. 1143, 36 S. Ct. 615, 37 Am. Bankr. Rep. 1. Particularly is this so when, as here, the thing to be established is the allocation of lots sold to lots purchased at different dates and different prices. The required identification is satisfied, if the margin trader has, through his broker, designated the securities to be sold as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the 'First-in, first-out' rule is to be applied."

In *Howbert vs. Penrose*, 38 F. (2d) 577 (C. C. A. 10), the Court in its syllabus said:

> "2. Where taxpayer claimed that in selling shares of stock in 1918 he sold stock acquired in 1916 and 1917, and sustained loss on sale, proof that cer-

FILE COPY

Supreme Court of the United States

October Term, 1938

No. 43

JAMES S. DAVIDSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

J. A. C. Kraemer,
Van C. Hoskins,
Gilmore L. Dickey,
Edward J. Simmons,
Ralph E. Simmons,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1938

No. 18

JAMES E. DAVIDSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

This matter arises over an issue of deficiency in income taxes in which an opinion was rendered by the Board of Tax Appeals reported in 34 B. T. A. 555, which is also to be found at Record, page 9. The decision of the Circuit Court of Appeals of the Eighth Circuit is reported in 94 F. (2d) 300, under the title of *Davidson v. Commissioner of Internal Revenue*. The decision of

the Circuit Court of Appeals of the Eighth Circuit appears on page 32 of the Transcript of Record.

JURISDICTION

The decree sought to be reviewed was entered January 31, 1938 (R. p. 38). Petition for Rehearing was filed by the Petitioner on February 11, 1938 (R. p. 38) and the order denying the Petition for Rehearing was entered February 22, 1938 (R. p. 9). The Petition for Certiorari was filed April 1, 1938, and certiorari was granted May 16, 1938.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 S. T. 938, 28 U. S. C. A., Sec. 347, page 359.

QUESTION PRESENTED

The question presented is whether the taxable gain from the sale of 1,000 shares of stock in National Power and Light Co. in the year 1929 is to be determined upon the basis of the cost of the shares which the Petitioner had ordered and instructed the broker to sell, or upon the basis of the cost of the certificates delivered by the bank, where the certificates were held as collateral, through error to the broker.

The Board of Tax Appeals, in its opinion and as affirmed by the Circuit Court of Appeals, held that the cost of the certificates delivered through error by the bank controlled.

The Petitioner contends that the cost of the shares ordered sold by him in the instructions to the broker controlled.

STATUTES INVOLVED

The Statutes involved are as follows:

"Revenue Act of 1928, c. 852, 45 Stat. 791:

"Sec. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) Computation of gain or loss.—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

"Sec. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) PROPERTY ACQUIRED AFTER FEBRUARY 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *"

STATEMENT OF CASE

The case arose out of the assessment of a deficiency in income taxes against the Petitioner as the result of transactions of James E. Davidson in 1929 in National Power and Light Co. Common Stock (R. pp. 12, 13, 14). There were other transactions in stocks involved in the trial before the Board of Tax Appeals, but no deficiency arose as the result of any of the other transactions

and, therefore, the questions involved before this Court will be limited to the question as to whether or not any deficiency in taxes resulted from the transactions of the Petitioner in National Power and Light Co. stock in 1929.

There is no dispute as to the facts in this case and the findings of the Board of Tax Appeals are accepted as the basis for the determination of this question by both the Petitioner and the Government. The findings of fact limited to the transactions involved in this case are as follows:

"The next transaction in National Power and Light Co. stock occurred on March 27, 1929, when the petitioner purchased through the broker 1,000 shares with a part of the proceeds of a loan from the Omaha National Bank. Certificates for these shares numbered 80,250 to 80,258, inclusive, and 80,264 were delivered to the petitioner and put up as collateral with the bank as had been done in the previous transactions.

"On June 19, 1929, the petitioner instructed the broker to sell 500 of the 1,000 shares purchased on March 27, 1929, certificates for which were on deposit at the Omaha National Bank. When the sale was made the petitioner called at the bank to get the certificates for delivery to the banker, but the bank refused to release them to the petitioner, stating that they would make delivery themselves. The petitioner then instructed the bank to deliver 500 shares from the certificates numbered 80,250 to 80,258, inclusive, and 80,264. In making delivery of the certificates, however, a bank clerk, by mistake, delivered certificates from another lot which had been held as collateral by the bank since 1925. The mistake was not known by the petitioner at that time.

"On July 1, 1929, the petitioner instructed the broker to sell the remaining 500 shares purchased on March 27, 1929. When this sale was made he instructed the bank to deliver to the broker certificates for 500 shares from the remainder of the certificates numbered 80,250 to 80,258, inclusive, and 80,264. Again, however, the bank made the same mistake and delivered to the broker certificates for 500 shares from the same lot which it had held as collateral since 1925. The selling price of the first 500-share lot sold by the broker on June 19, 1929, was $28,042.50 and of the second 500-share lot sold July 1, 1929, was $31,392.50. The cost of the 1,000 shares purchased by the petitioner on March 27, 1929, represented by certificates 80,250 to 80,258, inclusive, and 80,264, was $49,900. The cost of the 1,000 shares delivered to the broker by mistake was $4.42 per share or $4,420 for the 1,000 shares." (R. pp. 13, 14.)

The deficiency in the tax assessed by the Board arose out of the determination by the Board that the cost of the one thousand shares delivered to the broker by mistake was $4,420.00 for the one thousand shares, whereas, it is the contention of the Petitioner that the stock sold on June 19, 1929, and July 1, 1929, was the stock purchased on March 27, 1929, at a cost of $49,900.00.

ASSIGNMENTS OF ERROR

Assignment No. I

The Circuit Court of Appeals erred in holding that the certificates of stock, delivered by error, by the bank clerk to the broker, identified the shares sold.

able to concur in the broad holding that a designation by instructions to the broker is controlling in all cases, though the certificate delivered does not correspond with the instructions. In the case at bar it is conceded that selling directions were given to the broker. It does not appear from the record that the instructions were written, as they were in the Miller case."

It will therefore be seen that if the case at bar had been presented to the Circuit Court of Appeals of the Second Circuit, the contentions of the petitioner would have been sustained and no tax, or deficiency, would have been determined against the petitioner. The rule should be uniform, irrespective of what Circuit Court of Appeals of the United States the petitioner is compelled to resort to. The Petition for Writ of Certiorari should therefore be granted and allowed in order that a uniform rule may be established, and a conflict of decisions may be thereby avoided.

CONCLUSION

In view of the fact that the question here involved is one of great general importance, because of the conflict of decisions in the various Circuits governing like situations, and in view of the fact that under decisions laid down by the Circuit Courts of Appeals, under almost identical circumstances, no deficiency of income taxes would be assessable or determined against the petitioner, and because of such conflict in decisions and to establish a definite rule or yardstick, which both the Gov-

ernment and the taxpayers can follow, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

J. A. C. KENNEDY,
YALE C. HOLLAND,
GEORGE L. DELACY,
EDWARD J. SVOBODA,
RALPH E. SVOBODA,
Counsel for Petitioner.